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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA – OAKLAND COURTHOUSE

18 CARL ZEISS MEDITEC, INC.,

19 Plaintiff,

20 vs.

21 TOPCON MEDICAL SYSTEMS, INC.,
22 TOPCON HEALTHCARE SOLUTIONS,
INC., TOPCON CORPORATION, TOBIAS
23 KURZKE, GREG HOFFMEYER,
GENEVIEVE FAY, KATALIN SPENCER,
24 TERRY KEITH BROCK, CHARLES
GUIBORD, JR., JOSEPH CICCANESE,
25 AND MICHAEL CHEN,

26 Defendants.

Case No. 4:19-cv-04162-SBA (LB)

**DEFENDANTS TOPCON MEDICAL
SYSTEMS, INC. AND TOPCON
HEALTHCARE SOLUTIONS, INC.'S
OPPOSITION TO PLAINTIFF'S RENEWED
MOTION FOR PRELIMINARY
INJUNCTION**

Date: March 11, 2020
Time: 2:00 p.m.
Place: 1301 Clay Street, Oakland, CA
Before: Hon. Sandra Brown Armstrong

TAC Filed: January 31, 2020
SAC Filed: January 6, 2020
FAC Filed: November 27, 2019

27 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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TOPCON MEDICAL SYSTEMS, INC. AND TOPCON HEALTHCARE SOLUTIONS, INC.'S
OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

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1 **I. INTRODUCTION**

2 Through this renewed motion, Plaintiff Carl Zeiss Meditec, Inc. ("CZMI") makes a second
3 futile attempt to stymie Defendant Topcon Medical Systems, Inc. ("TMS") and Topcon Healthcare
4 Solutions, Inc.'s ("THS")¹ lawful efforts to develop and release competing products. After his CZMI
5 employment ended, Defendant Tobias Kurzke retained a hard drive containing both his personal
6 information and CZMI information. However, Mr. Kurzke's possession of the hard drive does not
7 establish misappropriation by Topcon Defendants.

8 At least five times, THS instructed Mr. Kurzke against using third-party trade secret
9 information in Topcon Defendants' business. CZMI offers no evidence showing Mr. Kurzke
10 disobeyed those instructions. In fact, Topcon Defendants did not know he had the hard drive, until
11 after the inception of this lawsuit, and did not ask him to use and did not use the information on the
12 hard drive. As such, there is no justification for granting CZMI's request for a drastic remedy that
13 stops Topcon Defendants from releasing their products for a year or more.

14 CZMI's attempts to show Topcon Defendants committed trade secret misappropriation are
15 based on unsupported assertions, speculations, and exaggerations of the record. Although CZMI is in
16 possession of the hard drive, CZMI does not offer a single file from the hard drive that allegedly
17 shows misappropriation by Topcon Defendants. Further, CZMI does not cite to any of the 115
18 categories in its trade secret disclosure that it claims are stored on the hard drive. Despite deposing
19 Mr. Kurzke for over six hours, CZMI offers no deposition testimony showing that Mr. Kurzke
20 accessed CZMI's Glaucoma Workplace files on the hard drive that he could have used to develop
21 THS's Glaucoma Module. *CZMI does not connect the dots*, and simply argues Mr. Kurzke's retention
22 of the hard drive establishes misappropriation by Topcon Defendants.

23 There are many persuasive facts that compel a conclusion that CZMI is not likely to prevail
24 on its trade secret misappropriation claim against Topcon Defendants:

- 25
 - In 2013, CZMI's parent company gave Mr. Kurzke the hard drive with instructions to use
26 the device to back up his laptop. He regularly did so for the next five years.

27 ///

28 ¹ TMS, THS and Defendant Topcon Corporation are collectively "Topcon Defendants."

- During the last two years of his CZMI employment, Mr. Kurzke was not responsible for Glaucoma Workplace. As such, Mr. Kurzke believes he had very few, if any, Glaucoma Workplace documents, and no Glaucoma Workplace source code, on the hard drive.
- Because Mr. Kurzke was unhappy at CZMI, he interviewed with other companies. In fact, Mr. Kurzke reached out to Topcon Defendants about potential job opportunities.
- The development of Glaucoma Module has been ongoing for more than two years and THS has not applied for Food and Drug Administration approval to sell the software.

The evidence contradicts CZMI's arguments that Topcon Defendants recruited CZMI employees to steal trade secrets and used CZMI's trade secrets to develop competing products.

Furthermore, CZMI cannot show an imminent threat of irreparable harm, if the Court denies the requested relief. Mr. Kurzke has already returned the hard drive to CZMI,² and THS has not released Glaucoma Module. Aside from CZMI's requests for the return of the hard drive and preventing the release of Topcon Defendants' products, CZMI essentially asks the Court to order defendants to "obey the law," which would be a vague and unenforceable injunction under Fed. R. Civ. P. 65(d).³ Pursuant to Civil Local Rule 7-4, THS and TMS identify the following issues to be decided: Whether CZMI has presented sufficient evidence to show that it is likely to prevail in demonstrating that Topcon Defendants misappropriated its trade secrets, and whether CZMI has demonstrated an imminent threat of irreparable harm, if the Court denies the relief requested by this motion.

II. FACTUAL BACKGROUND⁴

A. TMS and THS Are Well-Established Competitors of CZMI.

Since 1970, TMS has been a well-respected developer and supplier of ophthalmic diagnostic equipment in the global medical device industry. Declaration of Kristen Nelson ("Nelson Decl."), ¶ 3.

² TMS and THS dispute CZMI's unfounded accusation that *Topcon Defendants* improperly withheld information about the hard drive. It is CZMI's burden to propound discovery to procure information. CZMI elected to propound discovery on Topcon Defendants, who did not possess the hard drive. After CZMI belatedly propounded discovery on Mr. Kurzke, he volunteered the hard drive to CZMI, before his discovery responses were due.

³ See *Cuviello v. City of Oakland*, No. C-06-5517 MHP (ECM), 2009 WL 734676, at *3 (N.D. Cal. Mar. 19, 2009).

⁴ CZMI supports this Motion with all the "facts" in CZMI's Third Amended Complaint ("TAC"). CZMI's MPA 2:17-18. The information in the TAC are unproven *allegations* – not facts. Topcon intends to bring a motion to dismiss challenging the sufficiency of the allegations in the TAC.

1 Topcon Corporation, which is TMS's parent corporation, was established in September 1932, and is
2 a comprehensive ophthalmic device manufacturer.⁵ *Id.* at ¶ 4. Incorporated in 2017, THS, a
3 subsidiary of Topcon Corporation, creates software solutions for the eye-care industry. *Id.* at ¶ 5.
4 Topcon Corporation has nearly 4,000 employees total. *Id.* at ¶ 6.

5 **B. Topcon's Software Products Have Lawfully Competed with CZMI's Software**
6 **Products Since At Least 2007.**

7 THS and TMS, on one hand, and CZMI, on the other hand, make competing software
8 programs, which give eye care professionals the ability to collect, store, manage, analyze, and access
9 digital ophthalmic data from various devices. Declaration of Tobias Kurzke ("Kurzke Decl."), ¶ 5.
10 TMS acquired Anka Systems in about 2006, which manufactured a software product called Eyeroute.
11 *Id.* at ¶ 6. TMS turned Eyeroute into the Synergy software product in 2011, and then THS turned
12 Synergy into Harmony (the current iteration of Topcon Defendants' data management software). *Id.*
13 Thus, TMS and THS have been selling a version of its Harmony software, since 2006. *Id.*

14 In 2008, Topcon Defendants released their Fastmap software, the predecessor to their
15 IMAGEnet6 software, which visualizes and processes ophthalmic diagnostic data to create reports
16 used by eye care doctors. Declaration of John Trefethen ("Trefethen Decl."), ¶ 7. Currently, THS is in
17 the process of developing an extension of Harmony called Glaucoma Module. Glaucoma Module has
18 been under development since 2017, in close collaboration with one of the world's leading glaucoma
19 experts, Dr. Donald Hood from Columbia University (who is not employed by Topcon Defendants).
20 Declaration of Jason Geller ("Geller Decl."), Ex. A, 214:5-16; 215:4-10; Trefethen Decl., ¶ 8.

21 On the other hand, CZMI's competitor software product is called FORUM and was released
22 in 2009. Geller Decl., Ex. A, 213:23-25; Kurzke Decl. ¶ 8. CZMI's Retina Workplace and Glaucoma
23 Workplace software are extensions of the FORUM product. Kurzke Decl., ¶ 8. CZMI also maintains
24 a website called ARI Portal, where a consortium of researchers collaborate. *Id.* at ¶ 10. Topcon
25 Defendants do not have products that compete with ARI Portal. *Id.* at ¶ 11. Topcon Defendants have

26 ///

27 ⁵ Defendant Topcon Corporation is a Japanese corporation headquartered in Japan, and has not been
28 served or appeared in this action. Thus, Topcon Corporation is not obligated to oppose this Motion.

1 no plans to develop a new product that will compete with Retina Workplace. *Id.* at ¶ 8.⁶ However,
2 Topcon Defendants' IMAGENet6 (and its predecessor software) has competed for many years with
3 CZMI's Glaucoma Workplace, and TMS intends that Glaucoma Module (once the product is done
4 with development) will also compete with CZMI's Glaucoma Workplace. Geller Decl., Ex. A, 188:8-
5 189:2; Trefethen Decl., at ¶¶ 6-7, 9.

6 **C. Mr. Kurzke's Testimony About the Hard Drive and His Departure from**
7 **CZMI Does Not Suggest He Stole Trade Secrets to Unlawfully Compete.**

8 Prior to working for CZMI, Mr. Kurzke worked for Carl Zeiss Meditec AG in Munich,
9 Germany. Geller Decl., Ex. A, 79:20-23. [REDACTED]

10 [REDACTED]
11 *Id.* at 98:2-20, 99: 16-21, 101:7-17. [REDACTED] *Id.* In 2015,
12 Mr. Kurzke moved from Germany to Dublin, California, and transitioned to become an employee of
13 CZMI. *Id.* at 45:11-46:7; 47:15-17. [REDACTED]

14 [REDACTED]
15 *Id.* at 105:21-107:16.

16 Mr. Kurzke likely purged Glaucoma Workplace documents from his work laptop and, in turn,
17 the hard drive, during his CZMI employment, as part of the normal course of business.⁷ Mr. Kurzke's
18 role as a product manager for Glaucoma Workplace stopped at the end of 2015, more than two years
19 before his employment with CZMI ended. *Id.* at 61:7-18; 62:18-24; 91:5-11. Thus, from 2016 to
20 2018, during the last two years of his CZMI employment, he had little reason to collect or maintain
21 Glaucoma Workplace documents on his laptop or the hard drive. Kurzke Decl., at ¶ 9. Because
22 Mr. Kurzke did not work as an engineer on Glaucoma Workplace, he never downloaded Glaucoma
23 Workplace's source code to this laptop or the hard drive. *Id.*

24 Contrary to CZMI's accusations, Topcon Defendants did not recruit Mr. Kurzke with the
25 intent to steal trade secrets. Because Mr. Kurzke was unhappy with his employment at CZMI, in 2017,
26 he started interviewing for a new position. Geller Decl., Ex. A, 174:8-175:3. Later, Mr. Kurzke

27 ⁶ None of CZMI's alleged trade secrets concern Retina Workplace. Dkt. 126-1, ¶ 7, Ex. 1.

28 ⁷ CZMI offered no evidence that Mr. Kurzke deleted any files from hard drive after leaving CZMI.

1 reached out to Topcon Defendants about job opportunities. *Id.* at 177:6-16.

2 Also contrary to CZMI's accusations, Mr. Kurzke did not retain the hard drive with the intent
3 to steal trade secrets. Instead, he retained the hard drive because it contained sensitive personal
4 information. *Id.* at 105:4-12; 110:8-21. Pursuant to the recommendation of the IT department,
5 Mr. Kurzke backed up his CZMI laptop to the external hard drive, as a precautionary measure in the
6 event his laptop was lost, stolen, or damaged. Kurzke Decl., ¶ 12. Near the end of his CZMI
7 employment, Mr. Kurzke downloaded files to the hard drive as part of his normal practice of backing
8 up the laptop and in preparation to transfer his work files to his successor, given his upcoming
9 departure from CZMI. *Id.* at ¶ 13.

10 At the conclusion of his CZMI employment, Mr. Kurzke returned property to CZMI,
11 including his laptop and paper files. *Id.* at ¶ 15. Mr. Kurzke retained the hard drive because the device
12 belonged to Carl Zeiss Meditec AG (not CZMI) and because he had his personal files on the device,
13 including photos, personal identification information, and tax and banking information. *Id.* CZMI
14 never specifically asked him to return the hard drive. *Id.*

15 **D. THS Instructed Mr. Kurzke Against Using Third Party Trade Secret**
16 **Information.**

17 When Mr. Kurzke became a THS employee, THS repeatedly instructed Mr. Kurzke to not
18 use the trade secrets of his prior employers in Topcon Defendant's business operations. During
19 onboarding as a new THS employee, Mr. Kurzke signed an agreement that he would not use his prior
20 employer's confidential or trade secret information in his work at THS. Kurzke Decl., 22, Ex. 1.
21 Similar instructions were in Topcon's Global Code of Conduct. *Id.* at ¶ 23, Ex. 2. Furthermore,
22 Mr. Kurzke attended two internal presentations and one training course, where THS management
23 reiterated the company's policy against use of third-party trade secrets. *Id.* at ¶¶ 24-26, Exs. 3-4.

24 **E. CZMI Has Not Produced Any Record Evidence of Mr. Kurzke's Use of Trade**
25 **Secret Information at Issue or Topcon Defendants' Knowledge of Such Use.**

26 Mr. Kurzke confirmed that he did not use any CZMI proprietary or trade secret information
27 on the hard drive to develop Topcon Defendants' products. *Id.* at ¶ 20. Mr. Kurzke stored the hard
28 drive at his home—not at Topcon's facilities. Geller Decl., Ex. A, 257:7-15. Mr. Kurzke's supervisors

1 and the head of THS's engineering division did not ask Mr. Kurzke to disclose or use CZMI's trade
2 secrets in his work and they did not know about the existence of the hard drive, until after the inception
3 of this litigation. Trefethen Decl., ¶¶ 10-12; Declaration of Akifumi Baba, ¶¶ 2-4; and Declaration of
4 Robert Orsino, ¶¶ 3-4.

5 When deposing Mr. Kurzke, CZMI's counsel had access to the hard drive. The following are
6 the only two files that CZMI's counsel asked Mr. Kurzke about at his deposition that were allegedly
7 accessed by Mr. Kurzke after he joined THS.⁸

8 9 ROW NUMBER	NAME OF FILE	FOLDER OR FILE	LAST ACCESSED	GLAUCOMA WORKPLACE DOCUMENT?
10 11 12				

13 Geller Decl., Ex. A, 259:15-25, 266:4-12. Accessing these files did not create an opportunity for
14 Mr. Kurzke to take CZMI's trade secrets concerning Glaucoma Workplace and use those to further
15 the THS's development of Glaucoma Module. Furthermore, accessing a Retina Workplace document
16 has no significance to this case because Topcon Defendants are not developing a new product that
17 will compete with CZMI's Retina Workplace and Retina Workplace trade secrets are not at issue in
18 this case. *Id.* at 198:3-199:13. CZMI fails to point to evidence that shows that Mr. Kurzke used
19 information on the hard drive to develop Glaucoma Module or other Topcon products.

20 **F. The Relevant Timeline Does Not Suggest Defendants Used CZMI's Trade**
21 **Secrets to Develop Glaucoma Module**


22 Contrary to CZMI's unfounded and speculative assertions, a timeline of the relevant events is
23 at odds with CZMI's theory that Topcon Defendants committed misappropriation. In fact, Topcon
24 Defendants started developing solutions in the Glaucoma space over twenty years ago. Trefethen

25 ⁸ At Mr. Kurzke's deposition, CZMI's counsel asked Mr. Kurzke about whether folders were
26 accessed, after he joined THS

27 [REDACTED] Geller Decl., Ex. A, 162:15-164:1, 168:10-
169:6

28 [REDACTED] *Id.*, see Kurzke Hard Drive Listing, Dkt. 127-04.
[REDACTED] Geller Decl., Ex. A, 162:15-164:1, 168:10-169:6.

Decl., ¶ 7. Further, as discussed above, even before Mr. Kurzke joined THS, Topcon Defendants were selling Fastmap, a prior version of IMAGENet 6, which is a product that competes with Glaucoma Workspace, and THS had already begun development of Glaucoma Module. Geller Decl., Ex. A, 189:22-190:4; 203:10-18; 216:2-15; Trefethen Decl., ¶ 9. THS's development of Glaucoma Module has been ongoing for more than two years and THS has not applied for regulatory approval from the Food and Drug Administration to sell the product (which is a process that could take up to a year). Geller Decl., Ex. A, 170:4-171:4; 172:12-19. Trefethen Decl., ¶¶ 5, 8.

2000	2008	2017	April 30, 2018	September 20, 2018	October 1, 2018	February 2020
Topcon Develops Solutions to Assist in Glaucoma Diagnosis	Topcon Releases Fastmap, Predecessor to IMAGENet 6, which Competes with Glaucoma Workplace	THS Starts Development of Glaucoma Module ⁹	Mr. Kurzke Begins Work for THS		THS Publicly Announces It Has Started Development of Glaucoma Module	THS has Not Released Glaucoma Module

III. CZMI CANNOT OBTAIN AN INJUNCTION ABSENT A "CLEAR SHOWING" OF IRREPARABLE HARM AND STRONG LIKELIHOOD OF SUCCESS

A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted unless the movant carries its burden of persuasion *by a clear showing*. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To establish a right to a preliminary injunction here, CZMI must demonstrate that: (1) it is likely to succeed on the merits of its breach of contract and/or trade secrets claim; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008). A plaintiff must prove *each* of the above elements to be awarded a preliminary injunction, whereas CZMI fails to satisfy any of them. Therefore, the Court should deny CZMI's request for a preliminary injunction.

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⁹ Trefethen Decl., at ¶ 8.

¹⁰ Kurzke Hard Drive Listing, Dkt. No. 127-04.

1 **IV. CZMI IS UNLIKELY TO PREVAIL ON ITS TRADE SECRET CLAIM BECAUSE**
2 **CZMI CANNOT SPECIFICALLY IDENTIFY ITS TRADE SECRETS OR SHOW**
3 **TOPCON DEFENDANTS MISAPPROPRIATED THOSE SECRETS.**

4 Under the California Uniform Trade Secrets Act (“CUTSA”) and the federal Defend Trade
5 Secrets Act (“DTSA”), CZMI is unlikely to prevail on its trade secret claim because it has failed to
6 show either (1) the existence of a trade secret; or (2) Topcon Defendants’ misappropriation of a trade
7 secret. *AccuImage Diagnostics Corp. v. Teraecon, Inc.*, 260 F. Supp. 2d 941, 950 (N.D. Cal. 2003).

8 **A. CZMI Fails to Identify a Trade Secret with Reasonable Particularity**

9 To obtain a preliminary injunction, CZMI must first identify its alleged trade secrets with
10 “reasonable particularity.” *Cal. Civ. Proc. Code* § 2019.210; *Action Learning Sys., Inc. v. Crowe*, No.
11 CV 14-5112-GW(SHX), 2014 WL 12564011, at *4 (C.D. Cal. Aug. 11, 2014). CZMI cannot carry
12 this “heavy burden ... without specifying what, exactly, it is trying to protect.” *Id.* Here, CZMI’s
13 alleged 115 categories of trade secrets are not stated with reasonable particularity, CZMI fails to state
14 which ones have allegedly been misappropriated by Topcon Defendants.

15 To describe its trade secrets, CZMI improperly uses catchall phrases like “including but not
16 limited to . . .[,]” “such as,” “various output formats,” and “design decisions.” Ex. 1, Nos. 9, 79-81,
17 107, 108. Courts within the Ninth Circuit routinely reject the use of “catchall” language as
18 insufficiently specific. *Loop AI Labs, Inc. v. Gatti*, 195 F. Supp. 3d 1107, 1115 (N.D. Cal. 2016)
(internal citation omitted).

19 CZMI’s alleged trade secrets also improperly incorporate hundreds of pages of documents
20 that CZMI alleges disclose the purported trade secrets. Ex. 1, Nos. 1-4, 17-34, 37-38, 41, 49, 51-56,
21 60, 65, 71-73, 83, 84, 91, 95, 97, and 102-106. Instead of directing Topcon Defendants to the specific
22 documentation containing the alleged trade secret, CZMI cites to several hundred documents in an
23 attempt to bury the potential trade secrets. *Alta Devices, Inc. v. LG Elecs., Inc.*, No.
24 18CV00404LHKVKD, 2019 WL 176261, at *4 (N.D. Cal. Jan. 10, 2019).

25 CZMI’s trade secrets are also impermissibly vague, overbroad, and refer to high-level
26 overviews of the claimed trade secrets. Ex. 1, Nos. 1-115. *See Agony Solutions.com LLC v. Trizetto*
27 *Corp., Inc.*, 819 F. Supp. 2d 1001, 1015 (E.D. Cal 2011) (denying injunction for failure to particularize
28 trade secrets). Here, CZMI’s trade secrets are described using vague, generic, and boilerplate phrases

1 such as “[t]he system described in Glaucoma Workplace SW Design,” “[t]he internal architecture of
2 each Service in Glaucoma Workplace,” “customer needs and preferences,” and “confidential
3 knowledge of known bugs or other weaknesses” *See AlterG, Inc. v. Boost TreadMills LLC*, 388
4 F. Supp. 3d 1133, 1145-46 (N.D. Cal. 2019) (finding plaintiff had insufficiently pled trade secrets
5 “related to [plaintiff]’s development of anti-gravity rehabilitation products” and “related to
6 [plaintiff]’s design and development of its anti-gravity rehabilitation training units”). Accordingly,
7 CZMI has not identified trade secrets with reasonable particularity to carry its burden on this Motion.

8 **B. CZMI Presents No Evidence That Topcon Defendants Misappropriated Its**
9 **Trade Secret Information**

10 Even if CZMI were able to specifically identify its trade secrets, it has not adduced any
11 evidence showing that Mr. Kurzke, let alone Topcon Defendants, used the information on the hard
12 drive in Topcon Defendants’ business operations or in the development of Glaucoma Module. In fact,
13 none of CZMI’s purported evidence supports its conjecture that misappropriation by Topcon
Defendants has occurred.

14 1. **CZMI’s Arguments that Mr. Kurzke Used Information on the Hard Drive**
15 **to Develop Topcon’s Products are Mere Speculation**

16 CZMI has all the information needed to investigate its trade secret misappropriation claim
17 against Topcon – Mr. Kurzke gave the hard drive to CZMI and CZMI has deposed three of the Former
18 Employees,¹¹ including a six-hour deposition of Mr. Kurzke. Yet, CZMI is still unable to offer
19 evidence showing Mr. Kurzke used information on the hard drive to develop any Topcon products.

- 20 • CZMI has not pointed to any Glaucoma Workplace files on the hard drive that
21 Mr. Kurzke accessed, after he joined THS.
22 • CZMI has not offered a single file from the hard drive that shows Mr. Kurzke used
23 CZMI’s information to develop Topcon Defendants’ products.
24 • CZMI has not cited to any of Topcon Defendants’ product or engineering documents to
show that Topcon Defendants used information on the hard drive in their business
operations.

25 Instead, CZMI uses Mr. Kurzke’s mere possession of the hard drive to launch a disjointed narrative
26 that Topcon Defendants are using CZMI’s trade secrets to develop Glaucoma Module. In reality,

27 ¹¹ Defendants Tobias Kurzke, Greg Hoffmeyer, Genevieve Fay, Katalin Spencer, Keith Brock,
28 Charles Guibord, Jr., Joseph Ciccanesi, and Michael Chen are collectively “Former Employees.”

1 CZMI is only able to show that Mr. Kurzke had a hard drive with CZMI's information on it – nothing
2 more.¹²

3 “Alleging mere possession of trade secrets is not enough.” *S. Cal. Inst. of Law v. TCS Educ.*
4 *Sys.*, No. CV 10–8026 PSG (AJWx), 2011 WL 1296602, at *7 (C.D.Cal. Apr. 5, 2011) (internal
5 quotation marks and alteration omitted). California law does not permit CZMI to try to prove trade
6 secret misappropriation by suggesting that its former employees' new employment will inevitably
7 lead them to rely on CZMI's trade secrets (the “inevitable disclosure doctrine”). *Pellerin v. Honeywell*
8 *Intern., Inc.*, 877 F. Supp. 2d 983, 989 (S.D. Cal. 2012). Furthermore, an employee physically taking
9 trade secret information after separating from a former employee and then performing the same work
10 for a new employer, without more, is not sufficient to state a claim of trade secret misappropriation
11 against the new employer. See *SOAPProjects, Inc. v. SCM Microsystems, Inc.*, No. 10-CV-01773-
12 LHK, 2010 WL 5069832, at *11 (N.D. Cal. Dec. 7, 2010).

13 In this district, CZMI's failure to cite any of its 115 categories of trade secrets disclosure that
14 allegedly exist on the hard drive is reason to deny CZMI's injunction request. In *uSens, Inc. v. Shi*
15 *Chi*, a former employee failed to return a company cellphone and laptop to plaintiff upon his
16 termination. 2018 U.S. Dist. LEXIS 175570, *2. This district court denied plaintiff's request for a
17 preliminary injunction on the grounds that plaintiff's bald assertions that the devices contained
18 plaintiff's confidential information was “speculative and [did] not adequately specify the alleged trade
19 secrets that are located on the cell phone and laptop.” *Id.* at *7-8.

20 2. CZMI's Incorrect and Unsupported Theory that Topcon Defendants
21 Poached the Former Employees to Launch Glaucoma Module is Not
22 Evidence of Misappropriation

23 CZMI alleges – without citation to evidence – that THS employees John Trefethen and Grant
24 Schmidt “recruited the Former Employees” because “the Former Employees possessed a wealth of
25 CZMI Trade Secrets which would allow Topcon to quickly launch a competing ODx Product.” CZMI

26 ¹² While CZMI has possession of the hard drive, CZMI claims it has only reviewed 3% of the files
27 on the device. CZMI MPA 2:3-4. CZMI has offered no files from the hard drive in support of this
28 Motion, and CZMI should not be given the benefit of the doubt that CZMI's further investigations of
the hard drive will show trade secret misappropriation by Topcon Defendants.

1 MPA 2:17-22. CZMI's allegations are a mischaracterization of the record.¹³

2 First, Mr. Kurzke testified that he was actively looking to leave CZMI and interviewing
3 for new positions. Geller Decl., Ex. A, 174:10-175:3. In fact, Mr. Kurzke reached out to Topcon
4 Defendants about potential opportunities. *Id.* at 177:6-16. As for Defendant Genevieve Fay, she also
5 testified that she was unhappy at CZMI, and came to THS through a third-party external head hunter.
6 Geller Decl., Ex. B, 179:5-22; 183:9-184:5; 188:8-24. In summary, the Former Employees came to
7 THS and TMS through different sources and at different times. CZMI offers no legitimate evidence
8 that Topcon Defendants "recruited" CZMI employees in order to steal trade secrets.

9 Furthermore, among the eight Former Employees, CZMI only correctly cites to one employee
10 – Mr. Kurzke – who works on THS's unreleased product, Glaucoma Module. CZMI MPA 3:23-27.
11 CZMI incorrectly claims that Ms. Fay works on Glaucoma Module. In fact, she is a "downstream"
12 marketing employee, who only works on products after they are ready for release. Geller Decl., Ex.
13 B, 218:4-12; 225:3-19. Ms. Fay does not work on products that are still in development, like
14 Glaucoma Module. *Id.* at 224:10-225:19. Defendant Keith Brock also does not work on Glaucoma
15 Module. Kurzke Decl., ¶ 19. Again, CZMI's arguments miss the mark because none of the Former
16 Employees actually work on Glaucoma Module, except Mr. Kurzke.

17 Here, CZMI argues that Topcon Defendants' hiring of the Former Employees is evidence of
18 trade secret misappropriation. However, this argument cannot stand because it is based on the
19 inevitable disclosure doctrine. *Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120
20 (N.D. Cal. 1999). As such, the fact that several employees left CZMI to work for THS or TMS is
21 neither direct, nor circumstantial evidence of trade secret misappropriation.

22 3. The Rate of THS's Development of Glaucoma Module Does Not Show
23 Trade Secret Misappropriation By Topcon Defendants.

24 Because CZMI lacks evidence to support its request for preliminary injunction, CZMI
25 continues to argue, without evidence, that the alleged speed of THS's development of Glaucoma

26 ¹³ There is regular movement of employees between CZMI-affiliated companies, Topcon Defendants,
27 and its other competitors. For example, during the last two years, two high-ranking Topcon employees
28 moved to CZMI: Topcon's former Vice President of Marketing, Bob Gibson, and Topcon's former
Director of Imaging and Global Marketing & Product Design, Ben Turley. Trefethen Decl., ¶¶ 14-15.
Further, Mr. Kurzke's successor at CZMI was a lateral from another industry competitor, Heidelberg
Engineering, Inc. Kurzke Decl., ¶ 17.

1 Module is evidence of misappropriation by Topcon Defendants. This contention is unavailing.

2 The facts are starkly different than the facts of the *WeRide* case where the court found that the
3 speed of product development suggested trade secret misappropriation. *WeRide Corp. v. Kun Huang*,
4 379 F. Supp. 3d 834, 849-50 (N.D. Cal. 2019). In *WeRide*, the former employee retained plaintiff's
5 source code, before joining the defendant's competing company. *Id.* at 848. This district court
6 concluded that the defendant's development and demonstration of a competing autonomous car,
7 which performed "advance capabilities," in only ten weeks after the former employee joined
8 defendant's company, was sufficient evidence to show that plaintiff was likely to succeed on its trade
9 secret misappropriation claim against the defendant. *Id.* at 849-50. Here, unlike the *WeRide* case,
10 THS's development of Glaucoma Module has been ongoing for more than two years, and Mr. Kurzke
11 did not work as an engineer on Glaucoma Workplace and therefore did not download source code on
12 to his CZMI laptop or the hard drive. Geller Decl., Ex. A, 68:6-18; Kurzke Decl., ¶¶ 9, 20.

13 **V. CZMI HAS FAILED TO SHOW AN IRREPARABLE INJURY**

14 Beyond its inability to show a likelihood of success on the merits, CZMI is not entitled to the
15 extraordinary remedy it seeks because it cannot demonstrate that it will suffer irreparable injury
16 between the Court's hearing on this motion and trial. Indeed, the Supreme Court has held that
17 "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence
18 of an injunction." *Winter*, 555 U.S. at 22 (emphasis added). To show this, CZMI must establish that
19 the threatened injury is immediate, significant, and concrete or non-speculative. *See Friends of the*
20 *Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014) (immediate); *Caribbean Marine Servs. Co.*
21 *v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (non-speculative); *Dept't of Parks & Recreation v.*
22 *Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123-24 (9th Cir. 2006) (significant). As discussed more
23 fully below, CZMI cannot satisfy this heavy burden. Accordingly, for this separate reason, CZMI's
24 motion should be denied.

25 **A. There is No Presumption of Irreparable Harm in the Ninth Circuit**

26 CZMI incorrectly claims that this Court may presume that CZMI will suffer irreparable harm
27 upon a showing that its proprietary information has been misappropriated.¹⁴ However, the Ninth

28 ¹⁴ This argument is also unavailing because CZMI cannot show that its proprietary information has been

1 Circuit has rejected the presumption of irreparable harm in trade secret cases. *GSI Tech., Inc. v. United*
2 *Memories, Inc.*, No. C 13-1081 PSG, 2013 WL 12172990, at *11 (N.D. Cal. Aug. 21, 2013); *Flexible*
3 *Lineline Sys., Inc. v. Precisions Lift, Inc.*, 654 F.3d 989, 996 (9th Cir. 2011).

4 The unpublished decision on which CZMI relies to support its point is readily distinguishable.
5 In *W. Directories, Inc. v. Golden Guide Directories, Inc.*, this Court presumed that plaintiff –
6 defendant’s former employer – suffered irreparable harm because defendant stole a computer from
7 his former employer and commented that the computer had “everything he needed to run his new
8 business.” No. C 09-1625 CW, 2009 WL 1625945, at *4-5 (N.D. Cal. June 8, 2009). Because the
9 former employer in *W. Directories* submitted credible evidence raising serious concerns as to whether
10 defendant had already stolen a database of plaintiff’s existing clients, this Court presumed plaintiff
11 would suffer irreparable harm if the defendant interfered with plaintiff’s business relationships. *Id.* at
12 5-6. Here, there is no evidence that Topcon Defendants misappropriated or used any confidential
13 information obtained from CZMI.

14 **B. CZMI Does Not Face a Likelihood of Irreparable Harm**

15 As discussed above, CZMI’s trade secret misappropriation claim against Topcon Defendants
16 is unsupported by evidence and based on conjecture. Mr. Kurzke confirmed that he did not use any
17 information on the hard drive to develop Topcon Defendants’ products. Kurzke Decl., ¶ 16. Indeed,
18 CZMI did not submit any files from the hard drive to show that Mr. Kurzke accessed Glaucoma
19 Workplace files on the hard drive, after he joined THS. Instead, CZMI relies on bald assertions that
20 THS’s unreleased Glaucoma Module uses CZMI’s trade secrets. The law is clear that a “[s]peculative
21 injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.”
22 *Caribbean Marine Servs. Co.*, 844 F.2d at 674.

23 Further, CZMI fails to carry its burden to demonstrate “immediate threatened harm.” *Id.* A
24 plaintiff’s demonstration of a risk of irreparable harm in the indefinite future is not enough; the harm
25 must be shown to be imminent. *Midgett v. Tri-Cty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846,
26 850-51 (9th Cir. 2001). Here, THS’s development of Glaucoma Module has been ongoing for more
27 than two years and THS has yet to apply for regulatory approval to sell the product. Geller Decl., Ex.
28 misappropriated.

1 A, 170:4-171:4; 172:12-13. CZMI fails to show it faces immediate threatened harm, if an injunction
2 is not issued.

3 Moreover, CZMI offers no persuasive explanation as to why monetary damages would be
4 inadequate to compensate it for any injury. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir.
5 1994) (holding that where monetary damages can compensate plaintiff, preliminary injunction is not
6 justified). CZMI's reliance on *Waymo LLC v. Uber Technologies, Inc.* for a proposition that monetary
7 damages would be inadequate is misplaced. In *Waymo*, when defendant hired the former employee,
8 defendant knew or should have known that the former employee possessed over 14,000 confidential
9 Waymo files. N.D. Cal., May 15, 2017, No. C 17-00939 WHA) 2017 WL 2123560, at *10. In
10 addition, defendant later used some of the same information in its own product development efforts.
11 *Id.* Here, unlike the *Waymo* case, CZMI has offered no evidence that THS knew Mr. Kurzke had the
12 hard drive when THS hired him or that information from the hard drive was used to develop Topcon
13 Defendants' products. Given this distinction, there is no support for CZMI's argument that monetary
14 damages would be inadequate.

15 **VI. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY**
16 **DISFAVOR AN INJUNCTION**

17 Because CZMI has not shown a likelihood of success on the merits or a significant risk of
18 irreparable injury, this Court need not evaluate whether the balance of hardships favor an injunction
19 or the public interest. However, even if CZMI had demonstrated likelihood of success on the merits
20 (it has not), it must also show that the "balance of hardships tip sharply in its favor" and that an
21 injunction would promote the "public interest." *Bayer Corp.*, 72 F. Supp. 2d at 1120. Although CZMI
22 is responsible for showing both that the balance of hardships and the public interest weigh in its favor,
23 the two concepts are interrelated. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969) ("[T]he equities
24 of the licensor do not weigh very heavily when they are balanced against the important public interest
25 in permitting full and free competition in the use of ideas which are in reality a part of the public
26 domain."). CZMI has failed to meet its burden as to both.

27 The best way to promote the public interest is by encouraging fair and vigorous competition
28 in the use of ideas. *Yamashita v. Wilbur-Ellis Co.*, No. C 06-01690 (WHA), 2006 WL 1320470, at *8

(N.D. Cal. May 15, 2006). Although CZMI claims that its request for an injunction is designed to maintain the status quo, that would not be the practical result of its requested order. CZMI MPA 11:7-9. Rather, CZMI requests that the Court prevent Topcon Defendants from releasing any product that potentially use CZMI's trade secrets. CZMI MPA 12:13-15. By virtue of CZMI's failure to identify where those secrets purportedly exist within Topcon Defendants' products, and which of the 115 claimed trade secrets were infringed, CZMI is asking this Court to prevent Topcon Defendants from releasing any new products. Thus, the balance of hardship tips in favor of Topcon Defendants because if the Court issues the injunction requested by CZMI, Topcon Defendants will be impeded from continuing to release new products.

In fact, none of the cases cited by CZMI in its Motion, including *WeRide*, *Comet*, and *Harry Schein*, involve a court granting an injunction that prevented a competing business from releasing a product.¹⁵ Here, rather than attempting to preserve the status quo, CZMI seeks to stymie legitimate and lawful competition.

VII. CONCLUSION

For the reasons stated herein, TMS and THS respectfully request that the Motion for Preliminary Injunction be denied in its entirety.

Dated: February 21, 2020

Respectfully submitted,

FISHER & PHILLIPS LLP

By: /s/ Jason A. Geller

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TOPCON MEDICAL SYSTEMS, INC. and

TOPCON HEALTHCARE SOLUTIONS, INC.

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¹⁵ See *WeRide Corp.*, 379 F. Supp. 3d at 855-57 (issuing injunction prohibiting defendants' use, destruction and removal of plaintiff's trade secret information); *Comet Techs. USA, Inc. v. Beuerman*, 2018 WL 1990226 *1, 7 (2018) (issuing injunction against former employee, not any competing business); *Harry Schien, Inc.*, 191 F. Supp. 3d at 1074, 1079-80 (2016) (issuing injunction against former employee, not any competing business).

1 Dated: February 21, 2020

Respectfully submitted,

2 ROBINS KAPLAN LLP

3 By: /s/ Steven C. Carlson

4 STEVEN C. CARLSON

Attorneys for Defendants

5 TOPCON MEDICAL SYSTEMS, INC. and

6 TOPCON HEALTHCARE SOLUTIONS, INC.

7 **DECLARATION OF CONSENT**

8 Pursuant to Local Rule 5-1(i)(3) regarding signatures, I attest under penalty of perjury that
9 concurrence in the filing of this document has been obtained from the above-listed counsel for
10 Defendants TOPCON MEDICAL SYSTEMS, INC. and TOPCON HEALTHCARE
11 SOLUTIONS, INC.

12 Dated: February 21, 2020

/s/ Jason A. Geller

13 JASON A. GELLER